



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: JANUARY 06, 2023

IN THE MATTER OF:

Appeal Board No. 625909

PRESENT: MARILYN P. O'MARA, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective August 4, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to August 4, 2021 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing. The claimant was present but was not prepared to proceed and, therefore, is deemed to have failed to appear at the hearing. By default decision filed March 22, 2022 (022-05785), the Administrative Law Judge continued in effect the initial determination.

The claimant applied to reopen the decision of the Administrative Law Judge filed March 22, 2022. Upon due notice to all parties, a telephone conference hearing was held at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by and on behalf of the claimant and on behalf of the employer. By decision filed September 12, 2022 (), the Administrative Law Judge granted the claimant's application to reopen and overruled the initial determination.

The employer appealed the Judge's decision to the Appeal Board.

We have reviewed the entire record and have considered the testimony and other evidence. It appears that no errors of fact or law have been made insofar as

they concern the issue of the claimant's application to reopen A.L.J. Case No. 022-05785. The findings of fact and the opinion of the Administrative Law Judge, insofar as they concern the issue of the claimant's application to reopen only, are fully supported by the record and, therefore, are adopted as the findings of fact and the opinion of the Board.

As to the issue of misconduct, only, based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** The claimant worked as a carpenter for the employer's transit authority from November 30, 2015 until August 3, 2021. The claimant was aware of the employer's workplace violence prevention policy which includes provisions requiring that employees treat coworkers with courtesy, avoid argument and exercise patience and self-control under all conditions. The policy further provides that, "Employees must not make threatening gestures towards, or commit assault or battery against, any person, nor use loud, uncivil, indecent or profane language, even under the greatest provocation." The claimant was suspended on August 3, 2021, after an altercation with a coworker that day in violation of the policy.

An arbitration hearing was held on September 16, 2021 after the employer sought to discharge the claimant as a result of this incident. The claimant appeared at the hearing and was represented by counsel. The claimant was provided the opportunity to testify on his own behalf and to present witnesses and documents. Through counsel, the claimant was afforded the opportunity to question witnesses. An arbitration award was issued on October 18, 2021 and based on this award, the claimant was terminated for his conduct on August 3, 2021.

In the award, the arbitrator found the claimant to be less credible than his coworkers who testified and, in doing so, credited the testimony of the coworker involved in the altercation as well as a coworker who physically separated them to make the following findings: Neither the claimant nor his coworker were "pick" drivers who could be assigned trucks. On August 3, 2021, when the claimant learned that a truck was assigned to this coworker, the claimant followed the coworker outside and said to the coworker that if he could not drive the truck, his coworker could not either. When the coworker told the claimant that he was a back-up driver and could, therefore, drive the truck, the claimant called the coworker vulgar and derogatory names. When the coworker attempted to walk away, the claimant followed him into the building,

got into his face, used additional vulgarity, told the coworker to go f..k his mother, chest bumped the coworker and then pinned the coworker against a wall as he continued to yell and curse at him. Another coworker heard yelling and saw that the claimant had pinned the coworker against the wall while yelling and cursing at him. When this coworker came between them to physically separate them, the coworker who had been pinned against the wall walked away immediately but the claimant continued to move forward. It took a few seconds for the claimant to back away after being told to calm down. The claimant admitted that the other coworker physically came between him and his coworker to separate them. The claimant was an angry employee who lost control and who exhibited reprehensible behavior towards his coworker when he violated the employer's workplace prevention policies without any provocation or mitigating circumstance. The claimant's actions made the coworker feel unsafe at work.

OPINION: Pursuant to Matter of Ranni, 58 NY2d 715 (1982), Matter of Ryan, 62 NY2d 494 (1984), and Matter of Guimaraes, 68 NY2d 989 (1986), the Board is bound by the findings of fact made by the arbitrator provided that there is an identity of issues and provided that the parties were provided with due process at the arbitration hearing. The parties agree that the issues are the same in both proceedings as they both involve the claimant's conduct in the altercation with his coworker on August 3, 2021. We are not persuaded by the claimant's contention that he was not afforded due process in the arbitration hearing because the arbitrator was biased against him, the employer witnesses were not sequestered, and he did not have an opportunity to appear before an arbitrator of his choosing. Despite having several opportunities to do so, the claimant produced no evidence to support these contentions and ultimately conceded that his representative did have a say in the selection of the arbitrator. That the arbitrator found the claimant not credible is not evidence of bias. Significantly, the claimant conceded that he was accorded the opportunity to testify, to present evidence, and to question witnesses through counsel at the arbitration hearing. As such, appropriate due process was afforded the claimant. Consequently, we are bound by the arbitrator's findings of fact.

We do not agree with the Administrative Law Judge's conclusion that the arbitrator did not make any findings of fact but only stated the contentions and the testimony of the witnesses. In so finding, we note that prior to restating the testimony of the employer witnesses in her decision, the arbitrator found such testimony to be more credible than the claimant's testimony while stating her reasons for doing so. By doing so, the arbitrator

was making her findings of fact.

The arbitrator's findings of fact establish that the claimant, without provocation or mitigating circumstance, was the aggressor in the altercation with his coworker, that he used vulgarity and cursed when he continued the argument by following his coworker, and that he then initiated physical contact with the coworker until he had to be physically separated by another coworker. The claimant did not contest that he was aware of the employer's policies prohibiting such conduct. We are also not persuaded by the claimant's contention that he did not know that he could be discharged for such conduct because the employer did not uniformly enforce their policies and because cursing was commonplace at work since we find that the claimant's actions far exceeded mere cursing in the workplace. Even in the absence of a policy, the claimant should have known that his actions of initiating and continuing a confrontation with his coworker which included the use of cursing, vulgarities and physical contact would result in his immediate termination. As such, the claimant's conduct constitutes misconduct for Unemployment Insurance purposes.

DECISION: The decision of the Administrative Law Judge is modified as follows and, as so modified, is reversed.

The claimant's application to reopen 022-05785, is granted.

The initial determination, disqualifying the claimant from receiving benefits, effective August 4, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to August 4, 2021, cannot be used toward the establishment of a claim for benefits, is sustained.

The claimant is denied benefits with respect to the issues decided herein.

MARILYN P. O'MARA, MEMBER